

BEFORE THE
CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD
STATE OF CALIFORNIA

In the Matter of:

HERBERT V. NETHERY AND
MARTHA F. NETHERY,
Property Owners,

Respondents.

Case No. 2001-08AC

OAH No. L2002060164

DECISION

This matter was heard by Humberto Flores, Administrative Law Judge with the Office of Administrative hearings on November 21, 2002, in Los Angeles California.

Jody Feldman, Staff Counsel for California Integrated Waste Management, represented complainant.

James V. Kosnett, Attorney at Law, represented Respondent Herbert V. Nethery. Mr. Nethery appeared for the hearing.

Pursuant to an oral stipulation on the record, Complainant and Respondent Herbert V. Nethery agreed that Respondent Martha F. Nethery was to be excluded as a respondent in this case and that Complainant would proceed only against Respondent Herbert V. Nethery. As a result of said stipulation, the Administrative Complaint against Respondent Martha F. Nethery was dismissed.

Oral and documentary evidence was received and the matter was submitted for decision.

On December 26, 2002, the Administrative Law Judge received an ex parte communication in the form of a letter from Respondent Herbert Virgil Nethery. On January 6, 2003, pursuant to Government Code Section 11430.50, the record was re-opened and a copy of the ex parte communication was sent via facsimile and US mail to Complainant's counsel Jody Feldman and Respondent's counsel James V. Kosnett. The ex parte communication was marked exhibit B and made part of the record. Neither party requested an opportunity to address the ex parte communication within the ten day period set forth in section 11430.50(c). The record was closed and the matter was deemed submitted on January 16, 2003.

In the ex parte communication, Mr. Nethery requested to have Respondent Martha F. Nethery reinstated as a respondent in this case and that any decision rendered by the Administrative Law Judge include Martha F. Nethery. This request is denied. Once a matter is dismissed as to one respondent pursuant to a stipulation of the remaining parties, the Administrative Law Judge cannot unilaterally reinstate said respondent and issue a decision that would have a substantial impact on her rights.

FACTUAL FINDINGS

1. On August 1, 2002, a Complaint for Civil Penalties (Complaint) was issued by the California Integrated Waste Management Board (CIWMB) to Herbert V. Nethery and Martha F. Nethery, Property Owner, Nethery Waste Tire Site, Facility No. 36-TI-1191, under Sections 42850 and 42851 of the Public Resources Code (PRC).

2. The CIWMB has authority to inspect, permit, regulate and conduct enforcement actions against Waste Tire Facilities (WTFs) within the State of California under PRC, section 42800, et seq., and attendant regulations contained in Title 14 of the California Code of Regulations (CCR).

3. Herbert V. Nethery, property owner of Nethery Waste Tire Site, allowed waste tires to be stored at Assessor Parcel Number (APN) 0495-031-16-000, San Bernardino County, California. This site is not a permitted WTF.

4. The Nethery Waste Tire Site was reported to CIWMB by the California Highway Patrol after conducting aerial surveillance for waste tire piles. On April 12, 2000, a CIWMB representative inspected Respondents' property and found that the site contained approximately 3500 waste tires in an area covering over two (2) acres of the property. The storage of these waste tires was a violation of Title 14 CCR, Section 17351 – Fire Prevention, Section 17352 – Facility Access Security, Section 17353 – Vector Control and 17354 – Waste Tire Storage.

5. A written report of the inspection and a letter of violation dated May 1, 2000 was mailed by CIWMB to Herbert V. and Martha F. Nethery, informing Mr. and Mrs. Nethery that the accumulated waste tires must be removed by a registered waste tire hauler by June 30, 2000, and that copies of manifests given by the hauler upon receipt of the waste tires must be submitted by July 7, 2000. Respondents did not remove the waste tires within the time specified in the letter.

6. On July 6, 2000 the CIWMB inspector visited the waste tire site and observed that the approximately 3500 waste tires remained at the site. The tires were being stored in a manner that violated standards for fire prevention, facility access and security, storage and vector control.

7. Clean Up and Abatement Order No. 200-72, dated August 15, 2000, was issued by CIWMB to Herbert V. Nethery and Martha F. Nethery, property owners of Nethery Waste Tire Site, requesting that the operator/owners remove all waste tires from the location by September 29, 2000 in accordance with a schedule and operation plan. Said plan required that the CIWMB approve of the destinations of the tires to ensure that they are legally transported to an approved facility. Copies of destination receipts and Waste Tire Manifest were to be submitted to the CIWMB on or before October 6, 2000.

8. The Clean Up and Abatement Order also informed Respondents that if they did not comply with the Order, civil penalties could be imposed against them and the CIWMB could seek penalties ranging from \$500.00 to \$10,000.00 per day for each violation.

9. On October 17, 2000, the CIWMB inspector visited the site again and determined that a majority of the originally estimated 3500 waste tires were removed from the site. There were approximately 500 waste tires remaining. However, Mr. Nethery stated at the time that he did not have manifests nor destination site receipts to prove that the tires went to CIWMB approved destinations.

10. Rather than hire a registered tire hauler, Respondent Herbert V. Nethery asked friends and family to haul the waste tires from his property. None of the people who hauled waste tires from Mr. Nethery's property were registered tire haulers. Further, the tires were not taken to approved locations. Therefore, Mr. Nethery violated Clean Up and Abatement Order 200-72.

11. On December 20, 2000, CIWMB sent a letter to the Respondents demanding that copies of receipts or invoices from destination locations be supplied to CIWMB by January 31, 2001.

12. On February 2, 2001, the CIWMB received a letter from Respondent Herbert Nethery. Said letter was sent to the CIWMB inspector along with five written and signed statements of certain individuals stating that they had taken waste tires from the site to various locations. However, none of the stated locations were approved by the CIWMB beforehand and none have any authorization from CIWMB to store tires.

13. Respondent Herbert V. Nethery asserted at the hearing that he contacted numerous registered waste tire haulers but that all tire haulers he contacted were too busy to haul the tires away within the time parameters set forth by the CIWMB. Mr. Nethery's contention is not persuasive. Mr. Nethery previously mentioned to the CIWMB investigator that he had contacted only one certified waste tire hauler. Mr. Nethery also testified that he had several friends and his son take the tires (four at a time) to various locations, including the City of Barstow Corporate Yard and to the Barstow Landfill. This testimony is not credible. It would have required at least 750 separate trips to remove 3,000 tires four at a time. Further, Mr. Nethery version of the removal of the tires has changed in his previous statements to Complainant's investigator, his written statements, and in his testimony at the hearing.

14. Respondent Nethery is disabled and testified at the hearing that he is in a fixed income and that this fact should be considered in determining potential civil penalties in this case. Although the ability to pay is a factor to be considered in the imposition of civil penalties, Mr. Nethery did not present specific evidence concerning his financial condition, including assets, liabilities and income amount.

LEGAL CONCLUSIONS

1. Cause exists to impose civil penalties against respondent Herbert V. Nethery under Public Resources Code Sections 42850 and 42850.1, for illegal storage of approximately 3,500 waste tires, in violation Title 14, California Code of Regulations, Sections 17351, 17352 and 17353.

2. Cause exists to impose civil penalties against Respondent Herbert V. Nethery under Public Resources Code Sections 42850 and 42850.1, for failing to comply with Cleanup and Abatement Order No. 2000-72, in violation Public Resources Code Section 42845, as set forth in findings 7 through 12.

3. This is a case that began as a negligent violation of the statutes and regulations concerning waste tire storage and hauling. However, once complainant informed Respondent Herbert V. Nethery of the law and gave him numerous opportunities to comply with the relevant statutes and regulations, as well as Clean Up and Abatement Order 200-72, his failure to comply was intentional.

4. Complainant requested civil penalties in the amount of \$10,000.00. This is a reasonable amount considering the circumstances of this case, including the potential fire hazard and Mr. Nethery's consistent failure to comply with clean up requests. Respondent Nethery was in violation of statutes and regulations relating to the proper storage and transporting of waste tires for months. The Board could impose a civil penalty of at least \$500.00 up to \$10,000.00 for each day the respondent was in violation of said statutes and regulations.

ORDER

1. Respondent Herbert Virgil Nethery is hereby ordered to pay a civil penalty in the amount of the \$10,000.00 to the California Integrated Waste Management Board.

2. Under Public Resources Code Section 42853, payment of the civil penalty imposed herein shall be paid within 30 days of the issuance of this Decision.

DATED: January 17, 2003

HUMBERTO FLORES
Administrative Law judge
Office of Administrative Hearings